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IN THE

Supreme Court of the United States

OCTOBER TERM—1968

No. [redacted] 186

GEORGE D. MILLS,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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THE STATE OF NEW JERSEY,

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Petitioner, George D. Mills, prays that a writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in this case on March 4, 1968.

Opinion Below

The opinion of the New Jersey Supreme Court is printed in Appendix A, *infra,* and reported in 51 N. J. 277, as *State of New Jersey* v. *George D. Mills,* affirmed the judgment of conviction of defendant in the Hudson County Court for felony murder N.J.S.A. Judgment and Mandate of Supreme Court of New Jersey is inserted herein as Appendix B. *infra.*

Jurisdiction

The judgment of the Supreme Court of New Jersey here sought to be reviewed was entered on March 4, 1968 (Appendix *infra*) with a reported opinion filed March 4, 1968, affirming the conviction of defendant in Hudson County Court of felony murder in violation of N.J.S.A.

The Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3) since the petitioner is claiming the abridgement of rights, privileges and immunities under the Constitution of the United States, more particularly the Fourteenth Amendment, and is claiming a denial of Due Process and Equal Protection of the laws, thereunder.

Questions Presented

1. Were the written statements secured from the defendant by the Police and admitted into evidence, secured under such circumstances as to render them involuntary and therefore inadmissible against him?

2. In a prosecution for arson-murder where there was no direct evidence of incendiarism, and where the State was obliged to establish the incendiary character of the conflagration by expert testimony, was the defendant deprived of due process of law in conducting his defense by the tactics of the Prosecutor in constantly interrupting the defense cross-examination of the experts by numerous, unfounded, general objections?

Constitutional Provision Involved

UNITED STATES CONSTITUTION—Fifth Amendment

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."

UNITED STATES CONSTITUTION—Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The defendant, George D. Mills, was indicted by the Hudson County Grand Jury in the 1963 Term in Indictments 1138-63, 1139-63, 1140-63, charging the defendant with feloniously causing the death of Patricia, Kathleen and Daniel Carlin, respectively, by setting fire to the dwelling house in which they lived, contrary to the provisions of 2A:113-1 and 2A:113-2 of the Statutes of New Jersey. The said statutes, so far as they are pertinent to the matter at hand, provide:

2A:113-1:

"If any person in commiting, or attempting to commit arson . . . kills another, or if the death of anyone ensues from the committing of any such crime or act . . . then such person so killing is guilty of murder."

2A:113-2:

"Murder . . . which is committed in perpetrating, or attempting to perpetrate arson . . . is murder in the first degree."

After a trial before a Jury, the defendant was found guilty of first degree murder on all three indictments, with a recommendation, and he was forthwith sentenced to three life terms in New Jersey State Prison, the said sentences to be served concurrently.

On appeal, the New Jersey Supreme Court, while affirming the judgment of conviction, modified it to the extent of limiting the sentence to one life term.

The facts upon which the indictments and judgment of conviction were based were briefly these: On May 23, 1964, at about 1:45 a.m., a fire swept through the kitchen of the home of Joseph Carlin in Kearny, New Jersey, resulting in the deaths of the three Carlin children, Daniel, 14 years, Patricia, 13 years and Kathleen. The girls were found dead from asphyxiation in their bedroom but the boy died five days later as a result of complications consequent upon severe flame burns to the upper and lower portions of his anatomy.

The defendant, who was 26 years of age at the time of the fire, left school in the 9th grade and was operating, with a partner, a gasoline station about 150 feet from the Carlin home. On May 22, 1964, after completing his work assignment at the gasoline station for the day, he visited various clubs and bars in the area, where he did a good bit of drinking, and wound up back at the gasoline station around 1:30 a.m., as he testified, to feed his dog and take him for a walk. While there was some differences as to detail among the witnesses as to defendant's conduct thereafter, the evidence showed that he ascended the front steps of the Carlin home and tried to open the door but was unable to do so and he then came down the front steps and went around the back of the house and did not reappear for another five minutes. Defendant admits this and says he did what he did because he was in front of the house

he noticed a fire going on in the rear room of the Carlin residence and he tried to gain admittance at the front door to alarm the people in the house and when he was unable to do so, he went around the back of the house and tried to gain admission by the back door but was unable to do that too. And he then ran down to his gas station and telephoned the Fire Department. The Department's record showed that his call was the first one it received reporting the fire.

The Kearny Police Department and an independent arson investigator made a thorough search of the premises, and subjected numerous items involved in the fire to various chemical, chromatogram, spectographic and infra-red tests but were unable to find any trace of an accelerant or propagant having been used in the fire; although, concededly, did the defendant start the fire, he must, of necessity, have had to use an accelerant or propagant to enable the fire to reach the intensity it did in such a short period of time.

About five weeks after the fire the Kearny Police asked defendant to come to Police Headquarters and he did so. He arrived at 3:20 p.m. on July 1, 1964. He was turned over to Sgt. Jasmine of the New Jersey State Police for questioning. When defendant's wife came home from work at 4:00 p.m. she noticed her husband's gasoline station was closed. And when he didn't return home by 5:00 p.m. she went out looking for him. When she saw his car parked in the parking lot at Police Headquarters and the officer at the desk told her that her husband was in some part of the building and that as soon as he was located he would have defendant call her. This was around 6:00 p.m. When she didn't hear from him by 7:00 p.m. she went down to Police Headquarters and asked to see her husband. The officer at the desk put her off with the pretence that he didn't

know where he was in the building. After waiting an hour she renewed her request to see her husband but her request was refused.

Finally, at 9:00 p.m. she was called into a small room where her husband, the defendant, was. She stated that her husband seemed to be in a state of shock; he was very pale, his eyes were bulging and his hair was very messy (TP 1002, L1 to TP 1004, L18). A Protestant minister, Rev. Beemer, who was present at the time, described defendant as "harried, dejected, emotionally upset and crying" (TP 1719, L8 to TP 1720, L10).

In the meanwhile, and after defendant had been turned over to Sgt. Jasmine for questioning, he was requested to take a lie detector test and he readily consented. After the lie detector test was completed, Sgt. Jasmine admitted that he accused defendant of being involved in the setting of the fire (TP 923, L22); that he accused defendant of lying (TP 923, L24); that he accused defendant of starting the fire (TP 924, L13-14) and that defendant kept denying it right along during this badgering and questioning (TP 923, L25 to TP 924, L1). Finally, defendant broke down under this badgering and questioning and gave Sgt. Jasmine a statement in which he said that he was drunk on the night of the fire and, in some manner, unknown to him, he found himself in the kitchen of the Carlin home. He lit a cigarette and threw the match down and then something flared up and he got scared and ran out of the house. Shortly after giving this statement to Sgt. Jasmine he was turned back to the Kearny Police and they claimed he gave them the same statement. The detectives admitted that defendant was nervous and his hands were shaking (TP 978, L16-18) that his face was white (TP 973, L23) and that his hair was dissheveled (TP 967, L12).

Prior to questioning defendant, Sgt. Jasmine stated that he recited the Fifth and Sixth Amendments to the United States Constitution to the defendant, *verbatim* (TP 911, L5 to TP 912, L15) and a detective testified that he went over a printed paragraph on the paper on which the second statement was taken, stating, in effect, that defendant could review such statement and that such statement must be voluntary and could be used at his trial. Defendant denied that he had been given even these superficial monitions.

The defendant testified that all during his interrogation he told Sgt. Jasmine and then the detectives that he wanted to see his wife and he wanted to see his lawyer but they kept putting him off (TP 942, L12 to L24; TP 994, L18 and TP 995, L10).

Since in this posture of the proofs the State was lacking the indispensable evidence that the fire had been wilful and malicious in origin, it sought to supply this deficiency by the testimony of three, or rather two, "expert" witnesses (for one of the "expert" witnesses, at the conclusion of his cross examination, disclaimed being an expert (TP 519, L11 to L20)), on arson who testified that, in their opinion, the fire was incendiary in origin. Since this testimony of the "experts" was the keystone of the State's case, the defendant sought to give them a thorough cross examination to probe the bases upon which their opinions were based but he was distracted and frustrated from doing so by innumerable vague, general, baseless objections interjected by the Prosecutor, especially at critical phases of the cross examination, which destroyed its continuity and robbed it of its effect.

The following instances, though not exhaustive, are illustrative of the unjustifiable interruptions, distractions and frustrations which materially destroyed the effectiveness of the cross examination of the "experts" by the defendant:

Cross Examination of Sylvester:

TP 298, L8	TP 334, L4	TP 359, L4	TP 457, L2
TP 303, L19	TP 335, L6	TP 359, L24	TP 458, L13
TP 304, L8	TP 336, L8, 15	TP 361, L5	TP 464, L25
TP 305, L3	TP 337, L9	TP 362, L12	TP 466, L23
TP 311, L24	TP 338, L4	TP 367, L12	TP 468, L1
TP 316, L23	TP 341, L16	TP 368, L3	TP 477, L22
TP 317, L11	TP 342, L13	TP 373, L8, 10	TP 479, L4, 10, 20
TP 320, L10	TP 348, L22	TP 386, L9	TP 481, L14 to
TP 318, L15	TP 345, L24	TP 402, L7	TP 482, L25
TP 327, L5	TP 347, L24	TP 420, L25	TP 484, L11
TP 329, L15	TP 351, L23	TP 428, L18	TP 485, L13
TP 330, L14	TP 352, L5	TP 450, L17	TP 486, L16
TP 333, L6	TP 357, L13		TP 492, L14
TP 494, L5			
TP 498, L6			
TP 511, L24			
TP 518, L7			

Cross Examination of Brady:

TP 1130, L13			
TP 1134, L20	TP 1164, L10	TP 1191, L7	TP 1247, L14
TP 1136, L9	TP 1166, L7	TP 1204, L20	TP 1298, L8
TP 1141, L9	TP 1167, L10	TP 1213, L12	TP 1342, L12
TP 1144, L24	TP 1169, L5	TP 1223, L6, 23	
TP 1151, L8	TP 1170, L1	TP 1233, L18	
TP 1164, L10	TP 1170, L24	TP 1236, L11, 24	
	TP 1179, L10	TP 1240, L3, 10	

Cross Examination of Drew

TP 1372, L9
TP 1377, L4
TP 1388, L22
TP 1391, L9
TP 1394, L16
TP 1396, L15
TP 1412, L4
TP 1413, L21
TP 1430, L2
TP 1431 L5
TP 1435, L10
TP 1436, L13
TP 1437, L4
TP 1437, L19
TP 1440, L8
TP 1452, L11
TP 1471, L6
TP 1474, L22
TP 1478, L4
TP 1481, L5
TP 1487, L5
TP 1496, L6, 10
TP 1502, L22
TP 1503, L18
TP 1505, L8
TP 1506, L1
TP 1511, L19
TP 1525, L19
TP 1526, L15
TP 1528, L15
TP 1538, L15, 20
TP 1541, L12, 18
TP 1544, L25
TP 1547, L14
TP 1551, L17
TP 1552, L15
TP 1554, L6
TP 1555, L24
TP 1556, L15
TP 1557, L13
TP 1558, L14
TP 1560, L18
TP 1564, L11, 20
TP 1565, L11
TP 1566, L24
TP 1567, L10
TP 1572, L5, 9
TP 1573, L7
TP 1575, L1
TP 1576, L1
TP 1585, L21
TP 1586, L20
TP 1588, L4
TP 1589, L13, 16
TP 1590, L13
TP 1594, L12
TP 1595, L15, 25
TP 1597, L4
TP 1598, L9, 16
TP 1599, L21
TP 1601, L21
TP 1603, L1, 18
TP 1605, L19
TP 1606, L3
TP 1607, L16
TP 1609, L9
TP 1613, L10
TP 1617, L11
TP 1631, L18
TP 1638, L12
TP 1645, L5
TP 1649, L8
TP 1651, L25
TP 1659, L10
TP 1663, L16
TP 1665, L1, 8
TP 18
TP 1668, L23
TP 1672, L15,
TP 21

POINT I

The written statements secured from the defendant by the police and admitted into evidence were secured from him in violation of his rights under the 14th Amendment to the Constitution of the United States.

Since the within case was tried long after the decision of the United States Supreme Court in *Escobedo* v. *Illinois,* 378 U. S. 478; 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964) the rules laid down by this Court for custodial interrogation of a defendant by the Police are applicable and determinative of the question of the admissibility of the statements exacted from defendant in the within case. And judged by such standards they were clearly inadmissible. As the United States Supreme Court said in *Johnson* v. *New Jersey,* 384 U. S. 719, 733 (1966) 17 L. Ed. 882, 892.

> "Apart from its broad implications, the precise holding of *Escobedo* was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial, '(where) the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent' " 378 U. S. 490-491.

From the admissions made by Sgt. Jasmine of the New Jersey State Police during the course of his testimony it is unchallengable that the interrogation which produced the two statements, whose admissibility is here disputed, had

passed well beyond the investigatory stage before such statements were secured. Jasmine admitted that, before the statements were secured, he accused defendant of being involved in the fire; he told defendant he was lying when defendant denied it and that he knew defendant did it. It was only after protracted badgering and interrogating of that character that a statement was exacted from defendant. The second statement was exacted from defendant only a matter of minutes after Jasmine had secured his and it is substantially the same as that given to Jasmine.

And what pretence can be made here that defendant was "effectively warned of his absolute constitutional right to remain silent"? Jasmine testified that before the interrogation began he recited to the defendant, *verbatim,* the provisions of the 5th and 6th Amendments to the U. S. Constitution. This, to a person who never went beyond the 9th grade in school and whose mental level can be judged by several of the positions he held during his work career, viz. janitor and directing the deliveries of a group of newsboys. It would be difficult to conceive of a more empty, meaningless ritual than to recite the provisions of the 5th and 6th Amendments to the Constitution to a person like the defendant in the circumstances in which he was then placed. And what can be the use or significance of telling a suspect that he has a constitutional privilege to remain silent, when that is followed by a process of badgering interrogation and accusation designed for no other purpose than to break the will of the defendant and cause defendant to surrender his constitutional privilege? Well, might we recur to the words of the United States Supreme Court in commenting on the significance of the *Escobedo* decision in *Miranda* v. *Arizona,* 384 U. S. 436; 16 L. Ed. 2d, 694, 718, 86 Sup. Ct. 1602:

> "Our holding there (Escobedo) stressed the fact that the Police had not advised the defendant of his constitutional privilege to remain silent at the outset

> of the interrogation and we drew attention to that fact at several points in the decision, 378 U. S. 483, 485, 491, 12 L. Ed. 2d, 981, 982, 986. This was no isolated factor, but an essential ingredient in our decision. The entire thrust of police interrogation there . . . was to put defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the Police —was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused defendant to speak."

On a review of the circumstances under which the statements were exacted from the defendant in this case, can there be any doubt that "the entire thrust of the police interrogation here was to put defendant in such an emotional state as to impair his capacity for rational judgment"? and that "the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, cause defendant to speak". Note that the detectives themselves admitted that defendant was not composed, his complexion was pallid, his hair dissheveled and that he was nervous and his hands were shaking (TP 967, L12; TP 973, L23; TP 978, L16-18).

In *Haynes* v. *Washington,* 373 U. S. 503, 10 L. Ed. 2d 513, 83 S. Ct. 1336 (1963) the United States Supreme Court reversed the conviction of the defendant whose persistent request during his interrogation was to phone his wife or attorney. In this case, defendant testified that he repeatedly requested to see his wife and attorney but his request was refused. In this case it is undenied that defendant's wife had endeavored to talk to him at the Police Headquarters where he was in custody from 6 p.m. on the evening in

question and that she was refused admission to see him until 9 p.m. As the U. S. Supreme Court said in *Miranda* in commenting on the *Haynes* case, *supra,* and others of that general character "In other settings these individuals might have exercised their constitutional rights. In the incommunicado, police dominated atmosphere they succumbed."

POINT II

The defendant was deprived of due process of law in conducting his defense by the tactics of the Prosecutor in constantly interrupting the defense cross-examination of the experts by numerous, unfounded, general objections.

Since the keystone of the State's case was the testimony of the so-called expert witnesses, it was absolutely essential that they be subject to a thorough cross examination with respect to the conclusions they offered to the Court. In this case the zeal of the Prosecutor far outran his judgment and during the whole of their cross-examination, and particularly at crucial portions thereof, he interjected with innumerable baseless objections, trying to put answers into the mouths of his witnesses and destroying the continuity of the cross-examination.

Time and again when the defense reached a critical point in the cross-examination of the alleged "experts"—who were anything but candid and forthright in their testimony, it might be noted—it was interrupted by a shrill "I object" from the Prosecutor. None of the objections were specific so that, were the objections well founded, they could possibly be corrected. But they were all of a vague, general character which left defendant completely in the dark as to the true nature of the objection. This led to constant

wrangling between counsel and distracted defense counsel from his immediate objective in conducting what was, in the very nature of the case, a highly technical cross-examination. These tactics, even if not wilfully employed for the purpose of prejudicing and frustrating the presentation of the defendant's case, had the same effect as if they were, and deprived defendant of his right to a fair trial. As the United States Supreme Court said in *Berger* v. *United States* (1935), 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1814:

> "... it is as much his (the Prosecutor's) duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In this connection see also *Commonwealth* v. *Bolish*, 381 Pa. 500, 113 A. 2d 464; *Vierick* v. *United States*, 318 U. S. 236, 247, 248.

It is submitted that the questions posed herein are of substantial constitutional dimensions meriting a determination by this Court and that the decision made by the New Jersey Supreme Court with respect thereto is not in accord with the applicable decisions of this Court.

CONCLUSION

Wherefore, for the reasons above stated, it is respectfully submitted that this petition be granted.

Respectfully submitted,

EUGENE P. KENNY,
Attorney for Petitioner.

APPENDIX A

Opinion of Supreme Court of New Jersey

51 N. J. 277

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GEORGE D. MILLS,

Defendant-Appellant.

No. A-47.

Argued No. 21, 1967.

Decided March 4, 1968.

The opinion of the court was delivered by HANEMAN, J.

Defendant appeals from a judgment of guilty with a recommendation of life imprisonment on each of three indictments charging felony murder and from sentences of three concurrent life terms entered upon the convictions.

The testimony at the trial discloses that at approximately 1:45 A.M. on May 23, 1964 a fire swept through the kitchen of the home of Joseph Carlin at 226 Laurel Avenue, Kearny, N. J. The fire resulted in the deaths of the

three Carlin children—Daniel—14 years of age, Patricia—13, and Kathleen—10. Neither the mother nor the father was at home at the time of the conflagration. Both Mr. and Mrs. Carlin had jobs in Eagen's Restaurant in North Arlington, a short distance from their home. On May 22, 1964 Mrs. Carlin, having worked the luncheon shift, returned home after some shopping to prepare supper for the children. When the children were fed she left a sandwich on the kitchen table for her husband; cleaned the supper dishes and kitchen utensils; and left at about ten minutes to five to return to Eagen's to work from 5 P.M. to 2 A.M. She testified that when she departed from the Laurel Avenue home, the refrigerator was the only electric appliance pluged in; there was nothing on the stove; and the kitchen was tidy.

Mr. Carlin who had regular employment with the Prudential Insurance Company in Newark, worked part time as a bus boy at Eagen's Restaurant. On May 22, 1964, he arrived home from Newark at 5 P.M. He ate the sandwich theretofore prepared by his wife; changed his clothes; and drove to Eagen's where he worked until 8:30 P.M. He had his supper and a couple of glasses of beer and drove home where he watched television with his daughters. His son Daniel was not home, being in attendance at a dance. Some time before 10:30 P.M. he began to feel tired and, fearing that he would not remain awake in order to pick his wife up upon the completion of her work, he went to a nearby tavern. At the tavern, Mr. Carlin played pool until about one o'clock at which time he was driven home by a friend. He found his son, who had returned from the dance, sleeping in his bedroom. The two girls were asleep in the room they shared. He checked the kitchen and TV room and found nothing unusual. He then left the house at 1:15

Appendix A

A.M. arriving at Eagen's at 1:25 P.M. The Kearny Fire Department received a call at 1:43 A.M. notifying them of a fire at the Carlins' home. At 1:50 A.M. Mr. and Mrs. Carlin were advised at Eagen's that their house was on fire.

When the firemen arived at 226 Laurel Avenue at about 1:45 A.M. they found flames lapping out of the kitchen windows which had been blown out by the fire. Although the fire was largely confined to the kitchen the heat was so intense that the fire fighters at first could not gain entrance to the kitchen. The temperature was so high that a member of the rescue team could feel heat through his steel innersoled boots. Within three or four minutes of arrival most of the flames had been extinguished.

The girls were discovered dead in their bedroom. The boy was found badly burned, behind the front door. He died on May 29, 1964.

On May 23, 1964, defendant, an army veteran who had left school in the ninth grade, was 26 years of age. He, with a partner, operated a Sunoco gasoline service station locafed about 150 feet from the Carlin house. On the day in question, he opened the station at 7:00 A.M. and finished work around 3:30 P.M. He then went home and changed into a fresh Sunoco uniform—blue slacks and blue shirt. He proceeded to take a ride in his white Impala convertible, stopping at a Jersey City bar where he drank a few beers and shot pool for about an hour and three-quarters. He then went to the Midland Bar in Kearny, where he continued drinking beer and shooting pool until 6:30 P.M. At about 7:00 P.M. he arrived at the Ulster Club in Kearny where he stayed until some time after midnight.

According to his account, he was drinking beer the entire time with an occasional scotch. He was finally asked to leave the Ulster Club for making a fool of himself. Other defense witnesses testified that he was drunk when ejected from the Ulster Club at or about midnight. He then drove to his gas station and picked up his dog. From the station he went to the Snug Harbor Tavern, where he drank until just after 1:00 A.M. The bartender at the Snug Harbor Tavern testified that he was not intoxicated at one or one-fifteen A.M. when he left that tavern.

Up to this point there is not too much conflict between the State's and defendant's stories. The next portion of defendant's story, however, is diametricaly opposed to that of the prosecution. He claims that he drove back to the gas station and decided to walk his dog around the block, he spotted flames while passing the Carlin house; ran to both the rear and front door and was unable to enter; he then ran to the gas station and turned in the alarm before returning to the scene of the fire.

The State, on the other hand, adduced the following testimony: A neighbor who lives directly across the street from the Carlins, a Mrs. Elizabeth O'Reilly, testified that at 1:30 A.M. while looking out of her living room window, she saw a white convertible pull up and park in front of her house. Defendant admittedly was driving a white Impala on the night in question. An unidentifiable male figure who was wearing a short-sleeved tan shirt, open at the collar, and dark trousers, got out of the car, crossed the street, ascended the Carlin porch, and tried the front door; he then came down the steps and disappeared onto the driveway alongside the Carlin house. After about five minutes he reappeared and got back in the car. The man smoked for about a minute and then made a U-turn,

parking in front of the Carlin house. He got out of the car and walked up and down the sidewalk in front of the house for a minute or two. The figure then went into a neighbor's yard, looking up toward the back of the Carlin house. He suddenly hurried to his car, got in, and sped over to the corner gas station—turning in there. Mrs. O'Reilly immediately saw flames; she crossed the street and stood ringing the Carlin doorbell. Shortly thereafter, a man came up and asked "what happened". This man was wearing a tan shirt and Mrs. O'Reilly identified him as the man who worked in the corner gas station—the defendant, George D. Mills. According to Mrs. O'Reilly, defendant was greatly intoxicated and looked hysterical.

Another neighbor, Mrs. Patricia Symanski, testified that at about 1:00 A.M. she saw a white car park in front of Mrs. O'Reilly's and remain there for a couple of minutes. She noted that Mr. Carlin returned home about 1.05 A.M., remained talking in a car for approximately ten minutes and then went into the house for about five or ten minutes before driving away at about 1:20 A.M. After Mr. Carlin left, a white Chevrolet pulled up and parked in front of Mrs. O'Reilly's at about 1:30 A.M. Mrs. Symanski was watching television and did not notice anything further until the car made a U-turn and parked on Laurel Avenue, by the Carlin driveway. She then saw a man, whom she positively identified as defendant Mills, get out of the car. Defendant walked up and down the sidewalk, looking at the Carlin home; according to Mrs. Symanski, he was wearing a light jacket, closed at the top, and dark trousers. Defendant then got into his car and drove to the gas station at the corner. Mrs. Symanski saw flames and sparks coming out of the Carlin house almost immediately and ran to call the Fire Department.

While viewing the fire, another witness, Mrs. Ann Baumgartner, saw defendant standing in the Carlin driveway. According to her testimony, defendant was not drunk and she should detect no odor of liquor on his breath. He was wearing a "beige windjammer—a jacket with a zipper"—which was open and not zippered.

Mr. Anthony Kranziewski, grave digger in the cemetery where the three children were buried, reported seeing defendant on two occasions. One week after the burial, a man whom he identified as defendant went to the graves, knelt, and stayed for five or ten minutes. This person muttered, "Kathy, Kathy, Kathy"—the name of one of the victims. Two weeks after the funeral, the same person made a similar visit.

Four written statements of defendant were introduced by the State. Two were non-inculpatory and defendant raised no objection to their admisison. The other two, to the admission of which defendant objected, although not amounting to confessions of the commission of a crime, admit that defendant did enter the kitchen of the Carlin house through an unlocked rear door. Mills therein stated that after lighting a cigarette he flipped the match to the floor which burst into a blaze.

Upon defendant's request at the Kearny Police Station on July 1, 1964 for permission to consult a clergyman, he was visited by the Rev. Albert L. Beemer who testified that the defendant in his presence said to defendant's wife, between sobs, "You know that fire on Laurel Avenue. I did it."

The State presented three expert witnesses, all of whom concluded that the fire was of incendiary origin and that a propellant or accelerant had been used. These experts

ruled out other possible causes of the fire, and based their conclusion of incendiarism primarily upon the tremendous intensity which the fire achieved in a relatively short space of time.

The defendant denied the State's theory that a propellant or accelerent was employed and advanced three alternate theories in an attempt to explain the origin of the fire: (1) the fire was started in the ceiling of the kitchen by defective electric wiring, or (2) the fire was started when some gas, which escaped from the range across the kitchen, drifted behind the refrigerator and was ignited by a spark from the refrigerator, or (3) the fire was started behind the refrigerator by a defective plug.

The defendant advances the following arguments in seeking a reversal of the convictions:

1. Defendant's statements should not have been admitted into evidence.

2. Defendant was denied due process of law by the Prosecutor's tactics during the trial.

3. The trial court improperly admitted testimony concerning the white Impala convertible.

4. The trial court erred in admitting testimony that the defendant visited the grave of the fire victim.

5. The trial court improperly excluded testimony concerning the olfactory capacity of Mr. Carlin on the night in question.

6. There was insufficient evidence of the incendiary nature of the fire to support the verdict of the jury.

7. The trial court improperly refused to strike responses to hypothetical questions where those responses allegedly incorporated hearsay information.

Exhibit A

8. The imposition of three life sentences was invalid.

We shall treat of defendant's alleged grounds for reversal in the foregoing order.

I

Was it error to have admitted defendant's statements into evidence?

The two statements to which defendant objects were obtained (1) by Sergeant Louis Jasmine of the New Jersey State Police and (2) by Detective Black and Lieutneant Conn of the Kearny Police.

Defendant argues that these statements should have been excluded because he was not effectively advised of his constitutional rights to remain silent and to have the assistance of counsel. Since the trial commenced in February, 1966 before the decision in Miranda v. State of Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), he bases his claim to exclusion solely on Escobedo v. State of Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964). See Johnson v. State of New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966).

[1] The State's and defendant's versions of what transpired at the time the statements were made are diametrically opposed. However, we have fully reviewed and weighed all the evidence on the question of the admissibility of the statements and find that the trial court was correct in holding that the statements were voluntary. State v. Smith, 32 N. J. 501, 549, 161 A. 2d 520 (1960). Moreover, defendant did not request a lawyer and therefore cannot complain. State v. Ordog, 45 N. J. 347, 212 A. 2d 370 (1965).

Appendix A

II

Was defendant denied due process of law by the Prosecutor's tactics during the trial?

[2] Defendant directs this attack particularly to the nature of the Prosecutor's objections to the admission of evidence. The record discloses that the trial was sharply contested and the conduct of both counsel at times bordered on the edge of wrangling, frequently initiated and stimulated by the conduct of defendant's counsel. The trial court exhibited commendable restraint and so conducted the trial that it cannot be said that the State struck the defense any foul blows. In spite of the tense atmosphere of the trial, the record discloses that the Prosecutor's conduct did not exceed the bounds of fair play. See State v. D'Ippolito, 19 N. J. 540, 117 A. 2d 592 (1955). We find no merit in defendant's point.

III

Did the trial court improperly admit testimony concerning the white Impala convertible?

[3] We find no error in this admission. Only a small percentage of the population own and drive white Impalas. Thus it was a legitimate portion of proof of defendant's presence in the vicinity of the fire to show that he owned such a car and that it was in the immediate neighborhood directly prior to the conflagration. The proof that there were three or four other automobiles of a similar nature in the locality was to defendant's advantage as it permitted the inference that someone other than defendant could have been watching the Carlin house.

Appendix A

IV

Did the trial court err in admitting testimony that the defendant visited the grave of the fire victim?

Anthony Krazniewski, a grave digger in the cemetery where the Carlin children were buried, testified that on the Saturday following the burial of the children, defendant came to the cemetery in a white automobile. He asked to be directed to the grave where the girls were buried. He knelt at the grave and repeated "Kathy, Kathy, Kathy."

[4-6] The conduct of a defendant subsequent to the commission of a crime is relevant when the conduct in question indicates a consciousness of guilt. 1 Wharton, Criminal Evidence (12th ed. 1955) p. 404; 2 Warren on Homicide §215 (1961 Supp.) Unusual exhibitions of remorse for the victims of a crime may in some circumstances be probative of the guilty conscience of a party. Cf. State v. Crivelli, 89 N. J. L. 259, 98 A. 250 (E. & A. 1916); State v. Cerce, 22 N. J. 236, 125 A. 2d 689 (1956). Here, the jury could have found that defendant's acquaintance with the deceased children would not have explained his trip to the cemetery or his deep expression of grief.

We discern no error in the admission of the evidence.

V

Did the court improperly exclude testimony concerning the olfactory ability of Mr. Carlin?

[7] Defendant argues that the court erred in sustaining an objection to defense counsel's cross-examination of one of the State's experts in which he sought to elicit an opinion concerning the "deadening" effect upon one's olfactory

ability, of alcoholic consumption in a "smoke laden" tavern on a Friday night. The purpose of the line of cross-examination was to cast doubt upon Mr. Carlin's ability to detect smoke in the kitchen of his home when returned after several hours in a tavern.. The answer lies first, in the fact that there was no evidence of the "smoke" condition of the tavern—*i.e.*, whether there was much, little or no smoke; second, in the fact that the expert claimed no knowledge or skill in this area; and third, in the absence of any proof concerning the effect of alcohol on the sense of smell. We find no merit to this argument.

VI

Was there sufficient evidence of the incendiary nature of the fire to sustain a verdict?

[8] Defendant argues that in a criminal case, relying upon circumstantial evidence, to warrant a conviction, "the circumstances must exclude every reasonable hypothesis except that the respondent is guilty". The short answer to that argument is found in the proper test which is "in weighing circumstantial evidence to determine if guilt exists as in the case of direct or testimonial evidence, namely, whether it is sufficient to generate a belief of guilt beyond a reasonable doubt". State v. Ray, 43 N. J. 19, 202 A. 2d 425 (1964).

[9] The conclusion that Mills started the fire is corroborated by the Rev. Beemer's testimony of Mills' admission thereof to his wife. With this fact established the question is whether the fire was accidentally or intentionally started. The pre-trial admission of defendant that the fire originated from his carelessly tossed match is contradictory of his trial advance theory that the conflagration was

initiated by a fire in the ceiling or wall from a cause with which he had no connection. For the fire to have thus started from either or both causes simultaneously is a coincidence which strains believability. Far more believable than the tossed match or ceiling or wall theories, is that advanced by the experts, *i.e.*, the fire could not have reached its terrific intensity in the short period of time here involved without the use of accelerants and hence was not of an accidental nature. This testimony coupled with defendant's admitted unexplained presence in the kitchen at the inception of the conflagration, when weighed against defendant's unlikely theories, furnish ample believable testimony to generate a belief beyond a reasonable doubt of defendant's guilt.

VII

Did trial court improperly refuse to strike responses to hypothetical questions where those responses allegedly incorporated hearsay information?

Defendant here directs his attack to the testimony of one of the State's experts, Chief Drew of the Newark Fire Department. After cross-examination, the defense moved to strike Drew's answer to the hypothetical question on the ground that the opinion was based at least in part on hearsay not set forth in the hypothetical question. A reading of the entire Drew testimony leads to the conviction that he stated that his "initial" conclusion as to the cause of the fire was based upon his personal inspection of the premises and conversation with firemen who fought the fire. He did not state that the opinion he voiced in court was based upon any facts other than those recited in the hypothetical question. To the contrary the effect of his testimony was that he bottomed his conclusion on the facts

contained in the hypothetical question. In the light thereof, the court's refusal to strike was justified.

VIII

Did the court err in imposing three concurrent life sentences?

[10, 11] In the past New Jersey has resolved questions of this sort by resort to two tests, *i.e.* (1) "single transaction" test or (2) "same evidence" test. If the separate convictions arise out of a single transaction only one sentence may be imposed. State v. Mowser, 92 N. J. L. 474, 106 A. 416, 4 A. L. R. 695 (E. & A. 1919); State v. Hoag, 21 N. J. 496, 122 A. 2d 628 (1956) (minority opinion), affirmed 356 U. S. 464, 78 S. Ct. 829, 2 L. Ed. 2d 913 (1958); State v. Greely, 30 N. J. Super. 180, 103 A. 2d 639 (Hudson Cty. Ct. 1954) affirmed 31 N. J. Super. 542, 107 A. 2d 539 (App. Div. 1954); State v. Pennsylvania R. R. Co., 9 N. J. 194, 87 A. 2d 709 (1952). Also, where the evidence necessary to sustain one conviction is identical to that needed to sustain the other only one sentence may be imposed. State v. Hoag, supra, 21 N. J. at p. 502, 122 A. 2d at p. 628; State v. DiGiosia, 3 N. J. 413 (1950).

[12] We need not be here concerned with which is the correct test if indeed one may speak of a "correct test" at all, see State v. Currie, 41 N. J. 531, pp. 537-539, 197 A. 2d 678 (1964) since obviously the three deaths here resulted from but one criminal tranaction—*i.e.*, one act of arson—and the proof necessary to convict defendant of one of the homicides would not vary from that needed to convict on either of the other two. The imposition of three sentences—even though to run concurrently—is therefore improper. See State v. Pennsylvania R. R. Co., supra, 9 N. J. at 194, 87 A. 2d at 709.

Appendix A

When more than one sentence has been imposed where only a single sentence was proper, relief from the improper sentence has been variously granted. In People v. Lyons, 50 Cal. 2d 245, 324 P. 2d 556 (1958) the California Supreme Court was faced with determining the correct procedure to be applied to an appellant who had been convicted on two counts of receiving stolen property and sentenced to concurrent terms. The court determined that only one sentence was proper and concluded:

> "In a situation such as this, if any substantial objective of justice would be served thereby, this court could reverse [both judgments], order such counts consolidated, and remand the cause for rearraignment of the defendant for sentence and for sentence on the consolidated count. Inasmuch, however, as it does not appear that here either the state or the defendant will be prejudiced by a simple reversal as to one count and affirmance as to the other, and as finality of adjudication will thereby be expedited, we conclude that the latter procedure is the more desirable." (324 P. 2d at p. 573)

See also State v. Schlenger, 13 Ill. 2d 63, 147 N. E. 2d 316 (Sup. Ct. Ill. 1958).

Other jurisdictions have achieved the same result by applying other rationales. For example in O'Keith v. United States, 158 F. 2d 591 (5 Cir. 1946) the court merely ordered the additional sentence expunged, while in Green v. United States, 274 F. 2d 59 (1 Cir. 1960) affirmed 365 U. S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961), rehearing denied 365 U. S. 890, 81 S. Ct. 1024, 6 L. Ed. 2d 201 (1961), the court refused to grant a defendant the "paper satisfaction (for which he has not asked) of having the sen-

tences under Counts 1 and 2 vacated leaving him only with the single sentence under Count 3". The court treated the impropriety of the sentences as a "technical matter" and refused to correct it on the grounds that the defendant had not been harmed.

It is obvious in the present case defendant has not been prejudiced by the imposition of three concurrent life sentences. The three sentences shall be deemed, for all purposes, as one sentence imposed on a single conviction.

Affirmed and modified consistent with the foregoing.

For affirmance and modification: Chief Justice Weintraub and Justices Francis, Proctor, Goldmann, Schettino and Haneman—6.

For reversal: None.

APPENDIX B

Judgment and Mandate on Affirmance

(Filed—March 4, 1968.)

SUPREME COURT OF NEW JERSEY
Appeal Docket No. 5254
Criminal Action

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

GEORGE D. MILLS,

Defendant-Appellant.

JUDGMENT AND MANDATE ON AFFIRMANCE AND MODIFICATION

It is hereupon ordered and adjudged that the judgment of the Hudson County Court is affirmed and modified and it is further ordered that the record be remitted to the Hudson County Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice.

Judgment Entered March 4, 1968

Mandate Issued March 14, 1968

A True Copy

JOHN H. GILDEA
Clerk of the Supreme Court